

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEPHEN E. HUDSON

Claimant

VS.

SARA LEE

Respondent

AND

**INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA**

Insurance Carrier

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Docket No. 1,036,291

ORDER

Respondent and its insurance carrier appealed the November 5, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant alleges he injured his right shoulder from repetitive traumas he sustained while working for respondent. In the documents claimant filed with the Division of Workers Compensation, claimant indicated the right shoulder injury began “[o]n or about May 1, 2007, and continu[es] daily thereafter.”¹ In the November 5, 2007, Order, Judge Benedict granted claimant’s request for medical treatment after finding claimant sustained an accidental injury.

Respondent and its insurance carrier contend Judge Benedict erred. They argue claimant’s right shoulder injury did not arise out of and in the course of his employment with respondent. Conversely, they contend claimant’s right shoulder injury is the natural and probable consequence of an earlier left shoulder injury and, therefore, claimant should not be awarded workers compensation benefits in this claim. Respondent and its insurance carrier emphasize that claimant initially reported his right shoulder injury resulted from

¹ Application for Hearing, Form K-WC E-1, received by the Division of Workers Compensation on August 28, 2007.

overuse as he protected his previously operated left shoulder. In short, respondent and its insurance carrier request the Board to reverse the November 5, 2007, Order.

Claimant argues the preliminary hearing Order should be affirmed. Claimant notes his left rotator cuff was repaired in May 2005 and in August 2006 all work restrictions were removed. He stresses that he then performed his regular work duties without problems until early 2007 when he began having right shoulder discomfort. Claimant contends his right shoulder injury resulted from the repetitive overhead work activities and repetitive lifting he performed in his job, which included loading and unloading respondent's bakery products. Moreover, claimant argues no medical evidence was presented at the preliminary hearing that linked claimant's right shoulder injury to his earlier left shoulder injury. Accordingly, claimant requests the Board to affirm the November 5, 2007, Order.

The issue before the Board on this appeal is whether claimant established he injured his right shoulder in an accident that arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments the undersigned Board Member finds claimant has satisfied his burden of proof and the November 5, 2007, Order should be affirmed.

Injuries that result from accidents arising out of and in the course of employment are compensable under the Workers Compensation Act.² In addition, injuries or conditions that later develop as a direct and natural consequence of the initial compensable injury are also compensable under the Act. In *Jackson*,³ the Kansas Supreme Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

And in *Stockman*,⁴ the Kansas Supreme Court explained the *Jackson* rule, as follows:

² K.S.A. 2006 Supp. 44-501(a).

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁴ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

Whether an injury is a natural consequence of an earlier injury or the result of a new accident is a question of fact.⁵ Stated another way, the question of whether an injury results from a new and separate accident depends on the facts in each case.⁶

For approximately 18 years claimant has worked for respondent, which is a baking company. As a route salesman, claimant is required to load his truck each day, which requires lifting, pushing, and pulling 13- to 18-pound trays overhead.

In May 2005, claimant underwent left shoulder surgery. In approximately August 2006, claimant returned to his regular work duties without restrictions. Claimant did not notice any right shoulder symptoms until the first part of 2007, when he began experiencing discomfort and what he termed shoulder fatigue. In early May 2007, while he was seeing his personal physician for an unrelated medical condition, claimant told the doctor he was having some right shoulder problems. The doctor prescribed medications and physical therapy. Moreover, the doctor ordered an MRI, which indicated claimant had a torn right rotator cuff.

Eventually, on July 17, 2007, claimant returned to Dr. Allan D. Holiday, who had operated on his left shoulder. At that visit, claimant provided a history that he believed his pain started from overusing the right arm. Dr. Holiday recommended a right shoulder arthroscopy and rotator cuff repair. But respondent and its insurance carrier refused to provide that treatment, which led to the preliminary hearing before Judge Benedict.

At the preliminary hearing, respondent and its insurance carrier presented evidence that claimant received a workers compensation settlement for his left shoulder injury. They also presented evidence that claimant noted in an incident report that his right shoulder injury occurred as the result of overuse due to the left shoulder surgery. That incident report, which was dated May 19, 2007, also indicated claimant believed the right shoulder injury "just happened over time with the type of work that [he did]" and that claimant

⁵ *Smith v. Rossville Valley Manor*, 37 Kan. App. 2d 501, 154 P.3d 1114 (2007).

⁶ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh'g denied* (2007).

believed the injury may have been prevented “if [he] had a Box truck it would cut down on a lot of l[i]fting.”⁷

The undersigned Board Member affirms the Judge’s finding that claimant’s right shoulder injury is a new and separate accident that arose out of and in the course of his employment with respondent. At this juncture, claimant’s testimony is both credible and uncontradicted that he performed repetitive overhead activities loading and unloading his delivery truck. His testimony is also credible and undisputed that his symptoms progressively worsened as he continued working. Consequently, it is more probably true than not that as claimant continued to work for respondent and continued to repetitively lift trays of bakery products overhead he sustained repetitive traumas to his right shoulder that culminated in a torn rotator cuff.

As indicated above, respondent and its insurance carrier contend the right shoulder injury is a natural and probable consequence of claimant’s earlier left shoulder injury. They cite *Casco*⁸ and argue that decision precludes claimant from receiving workers compensation benefits in this claim. The undersigned disagrees. The cause of an injury is a question of fact. And in *Casco*, the Kansas Supreme Court found that the worker’s right shoulder injury was a natural and direct result of an earlier left shoulder injury. Conversely, the facts in the claim now before the Board indicate claimant’s right shoulder injury arose from the repetitive lifting and overhead work he performed for respondent after his left shoulder surgery and return to work. Hence, when the evidence establishes that work activity causes injury, the worker is entitled to receive workers compensation benefits. And when earlier injuries contribute to a later injury, permanent disability benefits may be reduced under K.S.A. 44-510a based upon the percentage of contribution.

In conclusion, claimant has satisfied his burden of proof that he sustained personal injury by accident arising out of and in the course of his employment with respondent. Therefore, the injury claimant sustained to his right shoulder is compensable under the Workers Compensation Act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁷ P.H. Trans., Cl. Ex. 4.

⁸ *Casco*, *supra*.

⁹ K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member affirms the November 5, 2007, Order entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Rodney C. Olsen, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge